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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JIMMY ANDREW JOJOLA,

Appellant,

v.

STATE OF NEW MEXICO, ex rel.
HUMAN SERVICES DEPARTMENT,

Appellee

ON APPEAL

FROM THE SUPREME COURT

OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

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June 1983

QUESTIONS PRESENTED

1. Whether New Mexico State Courts have jurisdiction to establish paternity and enforce child support against a putative father when the mother, child and the putative father are all members and residents of the Isleta Pueblo.

2. Whether New Mexico's application through the Human Services Department of New Mexico Public Assistance Act, and Domestic Affairs statutes, to establish paternity and enforce child support against an Isleta Pueblo member and resident is repugnant to the U.S. Constitution and laws because it impermissibly infringes upon the authority and right of the Isleta Pueblo Indians to make their own laws and be governed by them.

3. Whether 42 U.S.C. 602(a)(26) and 42 U.S.C. § 651 through 663 confer jurisdiction in the New Mexico State Courts to hear paternity and child support cases where the putative father, mother and child are all members and residents of the Isleta Pueblo.

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OPINION BELOW

The opinion of the New Mexico Supreme Court of the State of New Mexico reversing the order in favor of Appellee in the tribal court is reported at 660 P.2d 590 (N.M. 1983), Appendix A.

JURISDICTION

This is a civil action contesting the application of New Mexico's Public Assistance Act, § 27-2-28 N.M.S.A. 1978, and Domestic Affairs Statutes, § 40-5-7 N.M.S.A. 1978, against a member and resident of the Isleta Pueblo. The New Mexico Human Services Department filed a Petition seeking to establish the paternity of Appellant and to enforce child support. In addition, New Mexico's Human Services Department sought reimbursement for expenditures it had made to the mother on behalf of the dependent child, both of whom, were residents and members

of the Isleta Pueblo pursuant to 42 U.S.C. § 651 et seq. and 42 U.S.C. § 602 (a)(26).

The New Mexico District Court for the Second Judicial District, County of Bernalillo, decided it did not have subject matter jurisdiction to establish paternity and enforce child support brought by the State of New Mexico. Appendices C and D.

The major claim presented throughout is that New Mexico State Court action is preempted by federal policies, laws, and various U.S. Constitutional provisions. The trial court rendered a decision finding it lacked subject-matter jurisdiction to establish paternity and enforce and support and ordered the petition be dismissed.

The Supreme Court of the State of New Mexico rendered its decision on March 16, 1983 reversing the trial court and issued its mandate on March 31, 1983.

Appendix B.

Appellant filed his Notice of Appeal to the United States Supreme Court in the Surpeme Court of New Mexico and the District Court for the Second Judicial District, County of Bernalillo, on March 24, 1983. Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2)[1/]

1/ Appellant relies upon cases reviewed by this Court on Appeal in this appeal. Warren Trading Post, Co., v. Arixona Tax Comm'n., 380 U.S. 685, 14 L.Ed.2d 165, 85 S. Ct. 1242 (1965); McClanahan v. Arixona State Tax Comm'n., 411 U.S. 164, 36 L.Ed.2d 129, 93 S. Ct. 1257 (1973); Ramah Navajo School Board, Inc., et al. v. Bureau of Revenue of New Mexico, ___ U.S. ___, 73 L.Ed.2d 1174, 102 S. Ct. 3394 (1982). In the event the Court determines it does not have appellate jurisdiction, Appellant prays that the Court treat this jurisdictional statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3) and 28 U.S.C. § 2103. The importance of the issues here in terms of Indian self-government are compelling enough to justify the exercise of this Court's discretionary certiorari jurisdiction as was done in other Indian jurisdiction cases presenting different porblems e.g., Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed.2d 106, 98 S. Ct. 1670 (1978); Kennerly v. District Court, 400 U.S. 423, 27 L.Ed.2d 507, 91 S. Ct. 480 (1971) and Fisher v. District Court; 424 U.S. 382, 47 L.Ed.2d 106 96 S. Ct. 943 (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I §8, Clause 3; Article VI, Clause 2.

> The Congress shall have Power... to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

> This Constitution and the Laws of the United States which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATUTES INVOLVED

1. The relevant portion of the New Mexico Public Assistance Act, 27-2-28 N.M.S.A. 1978 is reproduced in Appendix F.
2. The relevant portion of the New Mexico Domestic Affairs Statute, 40-5-7 N.M.S.A. is reproduced in Appendix G.
3. The Act of August 15, 1953, c. 505, 67 Stat. 588, 589 and amended by Sec. 2 of the Act of August 24, 1954, c. 910, 68 Stat. 795, 28 U.S.C. § 1360 is reproduced in Appendix H.
4. Section 6 and 7 of the Act of August 15, 1953, c. 505, 67 Stat. 588, 590, 18 U.S.C. § 1162 is reproduced in Appendix I.
5. The relevant portions of P.L. 90-284, 82 Stat. 79, 25 U.S.C. §§ 1321-26 are reproduced in Appendix J.
6. The relevant portion of the Social Security Act, 42 U.S.C. § 602 (a)(26)

is reproduced in Appendix K.

7. The relevant portions of the Isleta Pueblo Legal Code are reproduced in Appendix L.

STATEMENT OF THE CASE

The Appellant, Jimmy Andrew Jojola, is a member and resident of the Isleta Pueblo. Appellee, Human Services Department for the State of New Mexico filed a paternity petition against Appellant pursuant to provisions of the New Mexico Public Assistance Act, the Domestic Affairs statutes and various provisions of the Social Security Act. In addition, Appellee sought reimbursement for expenditures it had made to the mother on behalf of her dependent child and sought prospective child support against Appellant. The Appellant, mother and child are all residents and members of the Isleta Pueblo.

The Appellant resisted the jurisdiction

of the New Mexico District Court in the course of the proceedings and filed a motion to dismiss for lack of jurisdiction. The District Court determined it lacked subject matter jurisdiction to establish the paternity of Appellant. The court entered detailed Findings of Fact and Conclusions of Law and ordered the paternity petition be dismissed. Appellee appealed to the New Mexico Supreme Court which reversed the findings of the trial court.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Appellant resisted the paternity petition filed by HSD in the District Court, Second Judicial District, County of Bernalillo, State of New Mexico by filing a Motion to Dismiss for lack of jurisdiction. The Motion to Dismiss alleged in part the federal law principles governing Indian

matters. The Motion alleged that the paternity petition was preempted by federal law which was enacted to protect assertions of state jurisdiction on Indian Reservations. Public Law 83-280, 28 U.S.C. § 1360 and 25 U.S.C. §§ 1321-1326. It was pointed out that such assertions of state jurisdiction are preempted by governing acts of Congress, Kennerly v. District Court, 406 U.S. 423 (1971); and, the Pueblo of Isleta Legal Code, Fisher v. District Court, 424 U.S. 382 (1976).

The Motion to Dismiss alleged in part that the paternity petition constituted an infringement by the State of New Mexico in the historically exclusive jurisdiction the Isleta Pueblo possesses in regulating the domestic relations of its members and residents. William v. Lee, 258 U.S. 217 (1959)

After briefing and argument the

District Court decided it did not have jurisdiction to establish the paternity of the Appellant and entered detailed Findings of Fact and Conclusions of Law and its Order. Appendices C and D.

The Appellee, Human Services Department appealed to the New Mexico Supreme Court. Appellant asserted that federal statutes; i.e., Public Law 83-280, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321-26; the United States Constitution, Article I, Section 8 cl. 3; and laws of the United States established principles preemptive of any state jurisdiction assertion. Williams v. Lee, 358 U.S. 219, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959), Kennerly v. District Court, 400 U.S. 423, 27 L.Ed.2d 507, 91 S. Ct. 480 (1971), McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 36 L.Ed.2d 129, 93 S. Ct. 1257 (1973). Appellant asserted that Isleta Pueblo's exercise of its

jurisdiction over the subject of paternity and child support preempted New Mexico's assertion citing Fisher v. District Court, 424 U.S. 382, 47 L.Ed.2d 106, 96 S. Ct. 943 (1976). On March 16, 1983, the Supreme Court of New Mexico reversed the trial court's order. Appendix A.

THE QUESTIONS ARE SUBSTANTIAL

1. The New Mexico Supreme Court decision is in conflict with decisions of this Court and over two hundred years of federal Indian legal history that preserves the right of Indian Tribes to exclusive jurisdiction over the domestic relations of their members and which preempts state jurisdiction.

This Court has always maintained that tribal forums have exclusive jurisdiction over the domestic relations of their members living in tribal relationship. U.S. v. Quiver, 241 U.S. 602, 60 L.Ed. 1196, 36 S. Ct. 699 (1916); Fisher v. District Court, 424 U.S. 382, 47 L.Ed.2d 106, 96 S. Ct. 943 (1976). Other federal courts have also held, Conroy v. Conroy, 575 F.2d 175 (8 C.A., 1978); Hallowell v. Hallowell, 210 F. 782 (8 C.A. 1914). aff'd, 239 U.S. 506 (1916); Yakima Joe v. To-is-lap, 191 F. 516 (D. Or. 1910).

The executive branch of the federal government has also found that tribal governments exercise exclusive jurisdiction over the Indian family when that family is located on the reservation. Powers of Indian Tribes, 55 I.D. 14, Oct. 25, 1934, 1 Opinions of the Solicitor, Department of Interior, 445.

In Williams v. Lee, supra, this Court set forth the test for state court jurisdiction over causes of action arising in Indian country with an Indian defendant as:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringe on the right of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220.

In Kennerly v. District Court, supra, this court held 25 U.S.C. 1321 et seq. was "a governing act of congress" under the Williams v. Lee test. And, See-

McClanahan v. Arizona Tax Comm'n, supra at 177-178. These statutes procedurally preempt the manner in which states may assume jurisdiction. This Court has characterized the preemptive effect of 25 U.S.C. §§ 1321 et seq. as a:

> Detailed regulatory scheme which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian Country Kennerly v. District Court, 400 U.S. 423, 424 n.1 (1971).

25 U.S.C. § 1321 et seq. requires a tribal vote to cede jurisdiction and a state vote to accept jurisdiction. These requirements must be "strictly complied with". Washington v. Yakima Indian Nation, 439 U.S. 463, 58 L.Ed.2d 740, 99 S. Ct. 740 reh. den., 440 U.S. 940, 59 L.Ed.2d 500, 99 S. Ct. 1290 (1979). Neither the Isleta Pueblo nor the State of New Mexico has complied with these

procedures. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977). See, Shepard v. Shepard, 655 P.2d 895 (Idaho 1982) for a detailed discussion in a state which has exercised its right to assume jurisdiction under P.L. 83-280, 28 U.S.C. § 1360 and 25 U.S.C. §§ 1321-26.

In State of New Mexico, ex rel., Human Services Department v. Jojola, 660 P.2d 590, every activity giving rise to the paternity claim between the mother and Appellant occurred while they were both residents of their own reservation. New Mexico merely subrogated itself to the claims of the matter pursuant to New Mexico statutes, 27-2-28 N.M.S.A. 1978, 40-5-7 et seq. N.M.S.A. 1978, and 42 U.S.C. § 602 (a)(26). Clearly, the mother could not have sued Appellant for paternity in the New Mexico District Court because the paternity proceeding would have been

appropriately characterized as litigation arising on an Indian reservation between reservation Indians. Fisher v. District Court, supra, 424 U.S. at 389.

New Mexico was subrogated to the claims of the Indian mother. The state's claims are no greater than those of the Isleta Pueblo Indian mother. United States v. Munsey Trust Co., 332 U.S. 234, 91 L.Ed. 2022, 67 S. Ct. 1599 (1947); Phoenix Insurance Company v. Erie Transportation Co., 117 U.S. 312, 29 L.Ed. 873, 6 S. Ct. 750 (1886); Martinez v. Martinez, 650 P.2d 819, 98 N.M. 535 (1982).

The New Mexico Supreme Court fashioned its opinion partly on the belief that because the nature of the claims was transitory, Appellant was subject to the jurisdiction of the district court. If the district court had jurisdiction over any transitory

transitory action arising on an Indian reservation then the New Mexico Supreme Court opinion has overruled this Court's holdings in Williams v. Lee, supra, and Kennerly v. District Court, supra. Those cases both involved a contract and an action in the nature of a debt brought by a non-Indian against reservation Indians where the claim arose on an Indian reservation. Contracts and collections of debts are also transitory actions. Would the result in Williams and Kennerly have been different if the Indian defendant had been served off the reservation on which they contracted their debts? The strong and time honored policy of protecting tribal jurisdiction for Indian activities arising on an Indian reservation, especially over the domestic relations of their members, the major element in this case, overcomes the mere venue considerations upon which the

opinion of the New Mexico Supreme Court is based.

2. The decision of the New Mexico Supreme Court misinterprets and violates the Indian jurisdiction test set out in Williams v. Lee because it impermissibly infringes upon the authority and right of the Isleta Pueblo Indians to make their own laws and be governed by them.

The Williams test requires that a reviewing court determine whether the assertion of state court jurisdiction would infringe on tribal self-government. The Supreme Court of New Mexico decided, without even a bow in the direction of such analysis, that the actions of the Appellee in filing its petition for paternity and child support did not interfere with tribal self-government.

The New Mexico Court did not discuss what tribal interests might be at stake. One cannot imagine an issue

more central to the self-government and determination of a separate people than jurisdiction to establish parentage and the family relationship. Nofire v. United States, 164 U.S. 657 (1897); Fisher & Quiver, supra; Conroy v. Conroy, supra; Relations of Pueblos to Their Members, the Federal Government, the State and Others, M-29566, August 9, 1939, I Opinions of the Department of Interior 913.

The record shows that the Isleta Pueblo was concerned with maintaining full jurisdiction over the domestic relations of its on-reservation members. To this end, the Isleta Pueblo Council enacted laws permitting suits for paternity to be brought in its tribal courts, 1-1-20, Isleta Pueblo Code (I.P.C.), Appendix L; and, to require sanctions for failure to support such dependants, 1-1-55 (I.P.C.,). Appendix L.

It is significant that establishment of paternity is condusive of membership in the Isleta Pueblo, 1-1-20 (I.P.C.), Appendix L. New Mexico State Court action in matters effecting membership would clearly infinge upon the right of the Isleta Pueblo not only to determine parentage but membership and inheritance in the Pueblo. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed.2d 94, 98 S. Ct. 1162 (1978); Fisher, supra, Williams v. Lee, supra.

3. The Social Security Act provisions do not confer jurisdiction of the New Mexico courts under the current jurisdictional tests.

Several cases have dealt with the issue of whether general federal statutes acknowledging state law or adjudications confer jurisdiction on state courts.

Under the Social Security Act a State plan must comply with the federal

requirements for the state to participate in the program. King v. State, 392 U.S. 309 (1968). The federal authority requires, in part:

> A state plan for aid and services to needy families with children must: ... provide that the State has in effect a plan approved under part D (42 U.S.C. 651 et seq.) and operate a child support program in conformity with such plan. 42 U.S.C. § 602.

Which in turn requires;

> provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan; 42 U.S.C. 654 (7)

and,

> (B) in the case of any child with respect to whom such assignments is effective, to

> secure support for such child from his parent (or from any other person legally liable for such support)...utilizing any reciprocal arrangements adopted with other states ..., 42 U.S.C. 654(4)

Essentially, the rule established by a series of cases in this court is that in resolving issues of whether a general federal act limits tribal sovereignty or other federally guaranteed Indian rights, special Indian rights will not be deemed affected unless there are clear indications that congress intended to limit or extinguish such rights. This rule has been applied in several cases.

Merrion v. Jicarilla Apache Tribe, __ U.S. __, 71 L.Ed.2d 21 (1982) (finding no clear indications that Congress intended implicitly to deprive the Tribe of taxing power in enacting, inter alia, national energy legislation); Squire v. Capoeman, 351 U.S. 1 (1956) (held general federal

income tax inapplicable to income from trust allotments in light of language and purpose of the General Allotment Act); Morton v. Mancari, 417 U.S. 535 (1974) (held Equal Employment Opportunity Act of 1972, guaranteeing nondiscrimination in federal employment, did not repeal preexisting Indian preference statutes).

In those instances where the conflicting general federal law is one regulating Indians in Indian country, the Supreme Court has said that such statutes should be construed to comport with principles of tribal sovereignty. In Ramah Navajo School Board v. Bureau of Revenue, __U.S.__, 73 L.Ed.2d 1174, 102 S. Ct. 3394 (1982), the Court said.

> We have consistently admonished that federal statutes and regulations relating to Tribes and tribal activities must be "construed generously in order to comport with... traditional notions of [Indian] sovereignty and with the federal policy

> of encouraging tribal independence. White Mountain, supra, 448 U.S., at 144; see also McClanahan v. Arizona State Tax Comm'n, 411 U.S., at 174-175 and n.13 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S., at 690-691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

Id., 73 L.Ed.2d 1174 at 1185, accord, Merrion v. Jicarilla Apache Tribe, __U.S. __71 L.Ed.2d 21, 39 (1982); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

It is presumed that Congress would have included an express grant of

jurisdiction to New Mexico if it had so intended for when Congress legislates on jurisdictional matters, it does so with the knowledge of the current state of the law. Califano v. Sanders, 430 U.S. 99 (1977).

Upon examining the legislative history at 42 U.S.C. § 651 et seq. as a whole it is apparent this litigation should have been in the Isleta Pueblo Tribal Court rather than the district court.

First, as discussed above, there is no congressional intent manifested to actually confer jurisdiction in this type of case on state courts. Rather, the legislation encourages intergovernmental cooperation in support collection. In addition to the general provision dealing with intergovernmental cooperation at 42 U.S.C. 654(9) both the applicable federal statutes and regulations, 45

C.F.R. 302.34 require the states to enter into "cooperative arrangements with appropriate courts and law enforcement officials" to enforce support obligations. Thus the Congressional mandate is not for states to engage in disruptive inter-governmental litigation, but to work cooperatively with the "appropriate courts". Applying this Congressional mandate to this suit, this paternity and child support claim should be in tribal court.

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. See, e.g., Fisher v. District Court, 424 U.S. 382 (1976): Williams v. Lee, 358 U.S. 217 (1959). See also Ex parte Crow Dog, 109 U.S. 556 (1883). [Footnote omitted].

Santa Clara Pueblo v. Martinez, 436 U.S. at 65-66.

If the tribal courts are not cooperative, the federal statutes contain provisions for certifying the question to federal

court, 42 U.S.C. 652 (a)(8)(B), and giving federal courts jurisdiction, 42 U.S.C. § 660, to hear such cases. Therefore the State has an adequate alternative forum if tribal courts prove inadequate. As a result the state is not left without a remedy if the state-tribal intergovernmental cooperation does not work.

CONCLUSION

For these reasons the questions presented are so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution, or summary reversal.

Respectfully submitted:

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APPENDICES

APPENDIX "A"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,

Petitioner-Appellant,

vs. No. 14,116

JIMMY ANDREW JOJOLA,

Respondent-Appellee.

SUPREME COURT OF NEW MEXICO
F I L E D March 16, 1983
/s/ Rose Marie Alderete Clerk

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

Philip R. Ashby, District Judge

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OPINION

RIORDAN, Justice.

State of New Mexico's Department of Human Services (DHS) filed a paternity petition in the District Court of Bernalillo County seeking a judgment to determine Jimmy Andrew Jojola (Jojola) to be the natural father of Jonathan Abeita and require Jojola to make monthly payments for his support. Jojola filed a motion to dismiss for lack of personal and subject matter jurisdiction. The district court dismissed the petition for lack of subject matter jurisdiction. DHS appeals. We reverse.

The issues on appeal are:

I. Whether the New Mexico district court has personal jurisdiction in this cause of action.

II. Whether the New Mexico district court has subject matter jurisdiction in the cause of action.

On October 13, 1979, Jonathan Abeita was born to Diane Abeita (Abeita). Both are members and residents of the Pueblo of Isleta Indian Reservation (Isleta Pueblo). In October 1979, Abeita applied for and was approved for public assistance under New Mexico's Public Assistance Act. §§ 27-2-1 through 27-2-36, N.M.S.A. 1978 (Repl. Pamp. 1982). As required by law, Abeita identified Jojola, who is also a a member and resident of Isleta Pueblo, as the natural father of her son. 42 U.S.C. § 602(a)(26) (1976 & Supp. IV 1980).

On April 2, 1981, DHS filed an action against Jojola to establish paternity and to campel support for Jonathan Abeita who was receiving public assistance. 42 U.S.C. §§ 651 through 663 (1976 & Supp.IV 1980); § 27-2-28; § 40-5-7, N.M.S.A. 1978. On May 21, 1981, a copy of the petition and summons was served upon Jojola at the campus of Albuquerque Technical Vocational

Institute which is located outside of the exterior boundaries of the Isleta Pueblo. On October 13, 1981, Jojola filed a motion to dismiss for lack of subject matter and personal jurisdiction. On November 23, 1981, the district court dismissed the action for lack of subject matter jurisdiction.

I.

PERSONAL JURISDICTION

Bastardy proceedings are generally considered transitory. 10 C.J.S. Bastards § 57, at 154 (1938). Transitory actions are not confined to any particular state. 21 C.J.S. Courts § 38, at 47 (1940). When a cause of action is transitory, any court of competent jurisdiction, where jurisdiction is obtained over the defendant, may entertain the cause of action regardless of where the parties were at the time of the cause of action or where the cause of action arose. Schultz v. Union

Pac. R. Co., 118 Cal. App. 2d 169, 257 P.2d 1003 (Dist. Ct. App. 1953); Mutzig v. Hope, 176 Or. 368, 158 P.2d 110 (1945); Gibbons v. Brimm, 119 Utah 621, 230 P.2d 983 (1951). Therefore, a paternity suit may be brought wherever the putative father is placed under the personal jurisdiction of the court. §40-5-9, N.M.S.A. 1978; See Surber v. Pearce, 97 R.I. 40, 195 A.2d 541 (1963).

Jojola was served with a copy of the petition and summons outside the Isleta Pueblo and within the State of New Mexico. He was, therefore, subject to the personal jurisdiction of the district court. Jojola's status as an Indian makes no difference. Indians that go beyond the reservation boundaries are subject to the nondiscriminatory state laws otherwise applicable to all citizens of a state. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Wisconsin Potowatomies, Etc. v. Houston, 393

F. Supp. 719 (W.D. Mich. 1973). Therefore the district court had personal jurisdiction over Jojola.

II.

SUBJECT MATTER JURISDICTION

Jojola asserts that the Isleta Pueblo has exclusive jurisdiction to regulate the domestic relations of its members. The test for determining if a state court has jurisdiction over causes of actions involving Indian matters is set forth in Williams v. Lee, 358 U.S. 217 (1959). Williams v. Lee, supra at 220, states that:

> Essentially, absent governing Acts of Congress, the question has laways been whether the state actions infringed on the right of reservation Indians to make their own laws and be ruled by them.

This test is principally applicable in situations involving a non-Indian party. Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). In these

situations, both a tribe and a state can fairly claim an interest in asserting their respective jurisdiction. Therefore, the Williams test was designed to resolve the conflict by providing a state could protect its interest up to the point where tribal self-government would be affected. Fort Mojave Tribe v. San Bernardino County, supra.

The first part of the Williams test is whether there are any Acts of Congress that govern this area. We have found none and neither party has directed our attention to any authority. The closest federal statute is 25 U.S.C. § 1911 (Supp. V 1981). Section 1911(a) states that:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving Indian child who resides or is domiciled within the reservation of such tribe....

However, this section deals with the adoption and foster care of Indian

children and not paternity determination and child support enforcement when a state is a party and the other party is an Indian.

The second part of the Williams test directs this Court to determine whether pursuing the state action in state court infringes on the right of reservation Indians to make their own laws and be ruled by them. A state cannot extend its powers into Indian country if it will infringe upon the right of the Indian people to govern themselves. White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978). Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977), sets forth a criteria for determing whether state involvement would infringe upon Indian self-government. The criteria is as follows:

> (1) whether the parties are Indians or non-Indians,
>
> (2) whether the cause of action arose within the Indian reservation, and

(3) what is the nature of the interest to be protected.

Id. at 206, 561 P.2d at 479.

When Abeita applied for public assistance for her minor child, in accordance with 42 U.S.C. § 602(a), she assigned her right to support DHS. Martinez v. Martinez, 98 N.M. 535, 650 P.2d 819 (1982). As we stated in Martinez, DHS is now subrogated to Abeita's position, and DHS has the right to collect the support obligation directly from the father. Therefore, the cause of action is between DHS, a non-Indian, and Jojola, the putative father, an Indian. Also, the cause of action arose outside of the reservation when Abeita filed and obtained public assistance and assigned her support rights to DHS.

The last criteria we must look at is which interest is to be protected. Jojola asserts that the interest to be protected is the tribe's right to regulate

the domestic affairs of the tribe. However, DHS asserts tht the interest to be protected is the State's public assistance program. DHS must abide by state and federal regulations in their assistance program. The federal government has set forth certain requirements in assistance programs, such as the collection of assistance from the non-custodial parent. Therefore, the interest to be protected is the uniform enforcement of paternity determination and child support obligations within this State.

In New Mexico, there are twenty-three separate jurisdiction which may have different statutes and rules. To require the State of New Mexico to proceed to the various tribal courts of the State would defeat and be a burden on the aims of the public assistance program. Therefore, we find no interference with tribal self-government as long as DHS does not assert

jurisdiction within the reservation.

We hold that the district court did have personal and subject matter jurisdiction over Jojola. The case is remanded to the district court for further proceedings not inconsistent with this opinion.

IS IS SO ORDERED.

/s/
WILLIAM RIORDAN,
Justice

WE CONCUR:

/s/
H. VERN PAYNE,
Chief Justice

/s/
WILLIAM R. FEDERICI,
Justice

/s/
HARRY E. STOWERS,
Justice

DAN SOSA, JR., Senior Justice, Respectfully Dissenting.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 14,116

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Bernalillo, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered DR 81-1660 on your Civil Docket, wherein State, ex rel Department of Human Services was Petitiner and Jimmy Andrew Jojola ws Respondent by your consideration in that behalf judgment was entered against said Petitioner; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Petitioner by appeal, whereupon such proceedings were had that on March 16, 1983, an Opinion was handed down by said Supreme Court and Judgment was entered reversing your judgment aforesaid,

and remanding said cause to you.

NOW THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said Opinion and said Judgment.

WITNESS, The Hon. H. Vern Peyne, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 31st day of March, 1983.

(S E A L)

Clerk of the Supreme Court of the State of New Mexico

APPENDIX "C"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
DEPARTMENT OF HUMAN SERVICES,

Petitioner,

vs. NO. DR. 81-1660

JIMMY ANDREW JOJOLA,

Respondent.

COURT'S FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

I.

FINDINGS OF FACT

1. The Respondent and Diane Abeita, recipient of assistance under the New Mexico Public Assistance under the New Mexico Public Assistance Act (Sec. 27-2-1, NMSA, 1978, et seq.) are enrolled members of the Pueblo of Isleta, an Indian Tribe.

2. The Respondent and Diane Abeita are both residents of and domiciled on the Pueblo of Isleta Indian Reservation.

3. Jonathan Abeita, the child of Diane

Abeita, who is alleged in this cause to be the child of the Respondent, resides on and is domiciled on the Pueblo of Isleta Indian Reservation.

4. The Pueblo of Isleta is an Indian Tribe, duly recognized as such by the United States Government, with self-governing powers as defined by Federal law. The Pueblo of Isleta has adopted a constitution pursuant to Section 16 of the Indian Re-organization Act of June 18, 1934.

5. The lands of the Pueblo of Isleta, upon which the Respondent, Diana Abeita and the child reside and are domiciled, are restricted Indian lands pursuant to the laws of the United States.

6. The New Mexico Human Services Department upon assignment from the recipient filed a Paternity Petition in the District Court as real party in interest to establish the paternity of Jimmy Andrew Jojola and to obtain an order for child

support.

7. The Congress of the United States did not grant civil or criminal jurisdiction to the State of New Mexico pursuant to P.L. 83-280, 18 U.S.C. 1162.

8. The State of New Mexico has not taken steps to acquire civil or criminal jurisdiction over the Isleta Pueblo and its members.

9. The Isleta Pueblo has not consented to the State of New Mexico's jurisdiction over Isleta Pueblo members resident within the Isleta Pueblo as required by 25 U.S.C. Sec. 1326.

10. Pursuant to the laws of the United States and the Pueblo of Isleta constitution, the Pueblo of Isleta has a law and order code and a Court with jurisdiction over paternity actions involving Indians residing on the Pueblo of Isleta Reservation.

11. The Respondent was served with process in this cause in Albuquerque, New

Mexico, within Bernalillo County, New Mexico, outside the exterior boundaries of the Pueblo of Isleta Indian Reservation.

12. The Tribal Court of the Pueblo of Isleta is vested with jurisdiction under the Pueblo of Isleta law and order code to determine the paternity of a member of the Pueblo and to obtain a judgment for the support of a dependent child after paternity is decided.

13. This Court is without jurisdiction over the subject matter of this cause.

14. Diane Abeita and Jonathan Abeita have received public assistance from the State of New Mexico, Department of Human Services, continuously since September, 1979.

15. All Requested Findings of Fact inconsistent with these findings of Fact are hereby denied.

II.

CONCLUSIONS OF LAW

This Court has no jurisdiction over the subject matter of this cause.

2. The action of the State of New Mexico in filing the Paternity Petition and seeking an order of child support infringes on the self-governing rights of the Pueblo of Isleta, an Indian tribe.

3. The The Tribal Courts of the Pueblo of Isleta have exclusive jurisdiction over paternity actions between resident members.

4. Any assertion of jurisdiction by this Court would be in violation of the laws of the United States as they pertain to Indians, Indian Tribes and Indian lands.

5. The Motion of the Respondent to dismiss this cuase must be granted as a matter of law, for lack of jurisdiction in the Court.

6. All Requested Conclusions of Law inconsistent with these Conclusions of Law are hereby denied.

/s/
Philip R. Ashby,
District Judge, Div. VII

APPENDIX "D"

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel
DEPARTMENT OF HUMAN SERVICES,

Petitioner,

vs. NO. DR-81-1660

JIMMY ANDREW JOJOLA,

Respondent.

ORDER

This matter having come on to be heard before the Court on the Motion of the Respondent to dismiss this cause for lack of jurisdiction and the Petitioner being represented by it's attorney Carrell Ray, and the Respondent being represented by his attorney, Anthony F. Little, and the Court having examined the Court file and having been made aware of the material jurisdictional facts and having heard the arguments of counsel and being full advised in the premises and good cause appearing

therefore,

IT IS ORDERED that said Motion to dsmiss for lack of jurisdiction is hereby granted.

IT IS FURTHER ORDERED that the Petition herein be and the same is dismissed for lack of jurisdiction in this court.

/s/
Philip R. Ashby,
District Judge, Div. VII

APPENDIX "E"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,
DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellant,

v. No. 14,116

JIMMY ANDREW JOJOLA,

Respondent-Appellee,

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jimmy Andrew Jojola Respondent-Appellee in the above-styled cause, appeals to the Supreme Court of the United States from the order of the Supreme Court of the State of New Mexico entered March 16, 1983, reversing the order of the District Court, Second Judicial District, County of Bernalillo, State of New Mexico.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted

By /s/

Anthony F. Little
INDIAN PUEBLO LEGAL
SERVICES, INC.
Star Route Box 38
Santa Ana Pueblo
Bernalillo, NM 87004
(505) 867-3391
Attorney for Respondent-
Appellee

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on March 24, 1983, I filed and served notice of Appeal to the Supreme Court of the United States in the above-matter upon all parties required to be served by depositing true copies thereof in the United States mail, first class postage prepaid addressed to:

Mr. Paul Bardacke
Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Mr. Carrell Ray
Assistant Attorney General
901 Virginia, N.E, Suite 101
Albuquerque, NM 87108

and that I filed a true copy of the above Notice of Appeal and Certificate of Service in the District Court, County of Bernalillo, State of New Mexico, on the same date.

By /s/
Anthony F. Little
Attorney for Respondent-Appellee

APPENDIX "F"

NEW MEXICO PUBLIC ASSISTANCE ACT

(EXCERPT)

27-2-28. Action

When a spouse or minor children are recipients of public assistance, the department may bring an action in its own name against the person responsible for the support of such recipients:

A. to recover amounts expended by the department on behalf of said recipients of such amounts as may be due and owing under an existing court order, whichever is less; and

B. for a continuing order of support for the benefit of such recipients.

APPENDIX "G"

NEW MEXICO DOMESTIC AFFAIRS STATUTE

(EXCERPT)

40-5-7. Proceedings to compel support; who may bring.

The proceeding to compel support and establish parentage of the child may be brought by a parent or if the child is or is likely to be a public charge, by the state of New Mexico. After the death of the complainant parent or in the case of his disability, it may also be brought by the child, acting through his guardian or next friend. If the proceeding is brought by the public authorities, the parents may be made defendants.

APPENDIX "H"

The Act of August 15, 1953, c. 505,67 Stat. 588, 589 and amended by Sec. 2 of the Act of August 24, 1954, c. 910, 68 Stat. 795, 28 U.S.C. § 1360.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians were parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected

Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United

State or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX "I"

SECTION 6 and 7 of the Act of August 15, 1953, C. 505, 67 Stat. 588,590, 18 U.S.C. §1162

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the area of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that an Annette Islands,

	the Metlakat la Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California ----------	All Indian country within the State.
Minnesota ----------	All Indian country within the State. except the Red Lake Reservation.
Nebraska ----------	All Indian country within the State.
Oregon ----------	All Indian country within the State,

except the Warm
Springs Reservation.

Wisconsin ----------All Indian country
within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of an real or personal property, including water rights, belonging to any Indian or any tribe, band, of community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or

regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the area of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

APPENDIX "J"

The Relevant Portions of P.L. 90-284, 82 Stat. 79, 25 U.S.C. §§ 1321-26.

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the ares of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within

that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; pr shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C.A. § 1322

(a) The consent of the United States

is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws or such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall

authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State or adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authrotiy which it may possess shall, if not inconsistent with any applicable

civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of Section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. § 1326

State jurisdiction acquired pursuant

to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

APPENDIX "K"

42 U.S.C. 602(a)(26)

§ 662. State plans for aid and services to needy families with children; contents; approved by Secretary

(a) State plan for aid and services to needy families with children must...(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required.

(A) to assign the State any rights to support from any other person such applicant may have (I) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (II) which have accrued at the time such assignment is executed.

(B) to cooperate with the State (I) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (II) in obtaining support payments for such applicant and for a

child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406 (b)(2) (without regard to subparagraphs (A) through (E) of such section).

APPENDIX "L"

ISLETA PUEBLO LEGAL CODE

(EXPERTS)

1-1-20, Determination of Paternity and Support.

The Pueblo of Isleta Judiciary shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of a child. A judgment of the judiciary establishing the identity of the father of the child shall be conclusive of the fact in all subsequent determinations of inheritance by the Pueblo of Isleta Judiciary.

1-1-21. DETERMINATION OF HEIRS.

(a) When any member of the Tribe dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring a suit in the Pueblo

of Isleta Judiciary to have the Judiciary determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of heirs shall be made unless all the possible heirs known to the Judiciary and to the claimant have been notified of the suit and given full opportunity to come before the Judiciary and defend their interests. Possible heirs who are not residents of the reservation under the jurisdiction of the Judiciary must be notified by mail and a copy of the notice must be preserved for the record of the case.

(b) In the determination of heirs the Judiciary shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the Judiciary shall apply the law of the State of New Mexico in deciding what relatives of the decedent are entitled to be his heirs.

(c) Where the estate of the decedent

includes any interest in restricted allotted lands or other property held in trust by the United States, over which the examiner of inheritance would have jurisdiction, the Pueblo of Isleta Judiciary may distribute only such property as does not come under the judisdiction of the examiner of inheritance.

1-1-55 Failure to Support Dependent Persons.

Any Indian who shall, because of habitual intemperence or gambling, or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period not to exceed three (3) months, or a fine of not more than $180.00, or both,

Office - Supreme Court, U.S.
FILED
JUL 22 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2049

IN THE

Supreme Court of the United States

October Term, 1983

JIMMY ANDREW JOJOLA,
Appellant,

v.

STATE OF NEW MEXICO, *EX REL.*,
HUMAN SERVICES DEPARTMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS

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July 12, 1983

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

QUESTIONS PRESENTED

(1) Whether actions and events subsequent to the New Mexico Supreme Court decision have rendered moot the question of which forum should determine paternity and set a level of child support.

(2) Whether the question of who must reimburse the Human Services Department for expenditures on behalf of the dependent minor child or in which court suit must be brought is ripe for review prior to a determination of paternity, and if so, whether that question should be addressed by this Court prior to its being addressed by the New Mexico Supreme Court.

PARTIES

The parties to the proceedings are identified in the caption of this case.

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42 U.S.C. § 651, *et seq.*, (Aug. 14, 1935, c.531, Title IV, §451, as added Jan. 4, 1975, Pub.L. 97-35, Title XXIII, §2332(a), 95 Stat. 861) 2

Public Records Act, N.M. Stat. Ann. §14-3-1, *et seq.*, (1978) 4

State Rules Act, N.M. Stat. Ann. §14-4-1, *et seq.*, (1978) 4

Public Assistance Act, N.M. Stat. Ann. §27-2-1, *et seq.*, (1978) 7

N.M. Stat. Ann. §27-2-27 (1978) 2

N.M. Stat. Ann. §27-2-28 (1978) 2,7

OTHER AUTHORITIES

N.M. Human Services Dept. Program Manual, Income Support Division, Vol. III, §§529, 548, 559.1, 569.2, 574 3,8

MOTION TO DISMISS APPEAL

The appellee State of New Mexico, *ex rel.* Human Services Department (hereinafter Department) respectfully moves the Court under Rule 16 to dismiss this appeal because there is no basis for jurisdiction under 28 U.S.C. §1257(2), and because events subsequent to the New Mexico Supreme Court decision have rendered this case moot. In addition the nonjurisdictional questions appellant Jimmy Jojola (hereinafter Jojola) seeks to raise are premature.[1]

Because of subsequent events the questions which Jojola seeks to present do not accurately state the questions before this Court. The questions now presented by this appeal are:

(1) Whether actions and events subsequent to the New Mexico Supreme Court decision have rendered moot the question of which forum should determine paternity and set a level of child support.

(2) Whether the question of who must reimburse the Human Services Department for expenditures on behalf of the dependent minor child or in which court suit

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[1] In January of 1983, a new administration took office in New Mexico and began instituting substantial policy changes in the state's relationship to Indian Tribes in New Mexico. These changes necessarily occurred after the appeal to the New Mexico Supreme Court was briefed and argued in 1982. An analysis of the state's position on domestic relations matters involving Indians was begun following the state Supreme Court's decision. The determination was made to defer to Tribal sovereignty in matters such as those presented by this appeal. The actions of the Department in developing new manual policy followed promptly. It was decided that Mr. Jojola be given the benefit of the new policy while the manual revision was being developed and, therefore, actions to implement the policy were instituted in this case.

must be brought is ripe for review prior to a determination of paternity, and if so, whether that question should be addressed by this Court prior to its being addressed by the New Mexico Supreme Court.

STATEMENT OF THE CASE

The following additional facts should be added to those presented in appellant's Jurisdictional Statement:[2]

1. On July 1, 1983, the Department issued a new formal policy governing the procedure to be followed in all cases seeking to establish paternity and set levels of child support where the child, mother and putative father are all Indians residing on the reservation. The new policy recognizes the right of the Indian people on a reservation to make their own determination of paternity and to set levels of child support. It further states the Department's policy will be to assist the mother of the dependent child in tribal court to establish paternity. See Appendix A.[3]

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[2] Responsibility to pursue paternity and child support obligations is delegated to the state by Subchapter IV-D of the Social Security Act, 42 U.S.C. §651, et seq. (Aug. 14, 1935, c.531, Title IV, §451, as added Jan. 4, 1975, Pub.L. 93-647, §101(a), 88 Stat. 2351, and amended Aug. 13, 1981, Pub.L. 97-35, Title XXIII, §2332(a), 95 Stat. 861). The state has designated the Department to fulfill these responsibilities by Section 27-2-27 and 27-2-28, N.M.S.A. 1978. These sections are set forth in full as Appendix E.

[3] The additional actions by the Department changing procedures and policy and obtaining dismissal of the original action in state court are properly to be considered by this Court. *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

2. On or about June 13, 1983, Dyana Abeita, the mother of the dependent minor child, filed a paternity and child support action on behalf of the child in Isleta Tribal Court. The Department's attorney represents her in this action. See Appendix B.

3. The Department filed a motion to dismiss its petition in the District Court of the State of New Mexico on June 13, 1983, on the grounds that the paternity issue would be pursued in the Tribal Court of Isleta. See Appendix C. On June 29, 1983, this motion was granted over the objection of Jojola, and the petition to determine paternity and set child support was dismissed without prejudice. See Appendix D.

ARGUMENT

I.

THIS CASE IS MOOT BECAUSE THE DEPARTMENT HAS ISSUED A FORMAL POLICY REQUIRING THAT PATERNITY PETITIONS SUCH AS THE ONE IN THIS CASE BE FILED IN TRIBAL COURT.

The Department has issued a formal policy statement which details the procedures to be followed in all cases similar to the one presented by this appeal.[4] The policy statement

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[4] The policy statement has been codified as Section 529, Case Application and Referral Procedures of the Department's Program Manual, Income Support Division, Volume III, Child Support Enforcement Program, and is reproduced in full and attached as Appendix A. The policy statement is repeated verbatim as Section 548 (Case Processing–Establishment of a Support Obligation), Section 559.1 (Case Processing–Establishment of Paternity), Section 569.2 (Case Processing–Enforcement), and Section 574 (Case Processing–Interjurisdictional Cases).

directs that in all such cases, in which the mother, putative father, and child are Indians who reside on the reservation, the paternity petition shall be filed in the Tribal Court of competent jurisdiction. This type of formal policy statement becomes part of the organic law of the State of New Mexico.[5] The Department is bound by the manual provision, which is enforced by the courts as the law of the state. *See Hillman v. Health and Social Services Department*, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

Formal changes of a Department's policy go far beyond the mere cessation of challenged activity by the defendants in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), where the Court was concerned that the defendants could freely return to their old ways. For the state to return to its former ways would require the same elaborate policy and manual revisions as have just transpired in instituting the changes found in footnote 4, *supra*. Formal policy statements are internal controls which the agency imposes on its own operations and exercise of power. Federal courts have recognized that similar statements by federal agencies have the force of law, *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974), or create binding law, as the court found in *Gibson Wine Co. v. Snyder*, 90 U.S. App. D.C. 135, 194 F.2d 329 (1952). This type of change in law, applicable to the case at bar and to all future cases, obviates the need for an Article III court to resolve the issues raised by the prior controversy.

The promulgation of this policy renders this case moot because it no longer presents a justiciable case or controversy.

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[5] The manual revisions are filed with the Records Center pursuant to the Public Records Act, Section 14-3-1, et seq., N.M.S.A. 1978, and State Rules Act, Section 14-4-1, et seq., N.M.S.A. 1978.

The Department has substantially adopted the position urged by Jojola, and the parties are in agreement on the issue presented for adjudication. A ruling from the Supreme Court of the United States now could not give Jojola any relief that he does not already have from the state. Consequently a decision by this Court would be merely advisory. As the Court has repeatedly noted, the Constitution of the United States limits the federal courts to adjudication of cases and controversies and bars advisory opinions. U.S. CONST. art. III, §2; *Liner v Jafco, Inc.*, 375 U.S. 301, 306, n.3 (1964).

The facts presented by this appeal are clearly encompassed by the new policy statement's provisions. Pursuant to the established policy, the Department is pursuing its remedies in Tribal Court where the parties are all Indians residing within the reservation. Mr. Jojola, Ms. Abeita and her son, Jonathan Abeita, are all enrolled members of the Isleta Tribe and reside on the Isleta reservation. Jurisdictional Statement, p. 14.

At the time the notice of appeal was filed in this case, a live controversy affecting the rights of Jojola existed. Since that time, however, the Department codified its policy decision to defer to Indian Tribal sovereignty in paternity determinations such as presented here. The controversy that was present when the case was initiated no longer exists and because the controversy must continue at the appellate or certiorari review stage, this case is now moot. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

Where changes have occurred such as here, this Court must review the decision below in light of the law "as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972); *Hall v. Beals*, 396 U.S. 45, 48 (1969). The promulgation of a formal manual revision by the Department extends the

protection of the policy not only to Jojola but to all similarly situated persons.

II

THE DEPARTMENT HAS SOUGHT AND OBTAINED A DISMISSAL OF THIS ACTION IN STATE DISTRICT COURT THEREBY MAKING THIS APPEAL MOOT.

On June 13, 1983, the Department filed a Motion to Dismiss this case in the District Court of New Mexico. This motion was granted on June 29, 1983. The Motion and the Order granting it are attached as Appendices C and D, respectively. The cause was remanded to that court on March 31, 1983, by the New Mexico Supreme Court. In conformance with the new policy, the Department will no longer pursue this case in the state's courts.

The legality of the forum initially chosen by the Department is the basis of the lawsuit on appeal. The withdrawal or voluntary dismissal of the legal action which is the basis of the appeal in itself renders the appeal moot. *Williams v. Simons*, 355 U.S. 49 (1957). There is no viable case or controversy of the kind necessary "to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). All the parties to this action are in agreement that this case should not be litigated in state court and further that appropriate jurisdiction for determinations of paternity lies in the Tribal Court. The dismissal by the state court leaves extant only the paternity action of the mother in Tribal Court, and no justiciable controversy remains before this Court.

III.

ANY DETERMINATION OF RESPONSIBILITY FOR REIMBURSEMENT FOR PAST CHILD SUPPORT IS PREMATURE AND NOT RIPE FOR DECISION.

A noncustodial parent is liable to the Department in the amount of the public assistance paid to persons to whom that parent owes a duty of support. Section 27-2-28, N.M.S.A. 1978. No action can lie for such repayments, however, until a determination of paternity is made. Neither the state district court nor the New Mexico Supreme Court has addressed the merits of this case; therefore, no determination has been made of the paternity of Jonathan Abeita. Until such time as the paternity of the dependent child is determined, any attempt to collect for sums expended by the Department and the federal government on the child's behalf would be premature. Any action against Jojola in any court to collect under the repayment statute would not be ripe for decision at this time. This Court should decline to decide this matter because it is not yet ripe for review.

The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). Whether Jojola owes any obligation to repay the sums expended under the Public Assistance Act (§§27-2-1, *et seq.*, N.M.S.A. 1978) is premature absent an adjudication that he is a "noncustodial parent [who] owes a duty of support." §27-2-28(A), N.M.S.A. 1978. A decision anticipating the Department's action is therefore inappropriate. The possibility

exists that the Isleta Tribal Court will determine that Jojola is not the dependent child's natural father. Until this issue is resolved by the Tribal Court, the Department cannot know what action it will take.[6]

The New Mexico Supreme Court did not address this matter in its opinion and thereby implicity recognized that the question was premature. Moreover, because the New Mexico Supreme Court did not make any decision concerning reimbursement actions, this Court should not assume jurisdiction to decide such a question.

IV

JOJOLA CANNOT INVOKE 28 U.S.C. §1257(2) WHERE THE NEW MEXICO SUPREME COURT HAS NOT RULED ON THE VALIDITY OF ANY NEW MEXICO STATUTE.

Jojola contends that he comes within the appeals provisions of 28 U.S.C. §1257 (2), by claiming that assumption of jurisdiction by the New Mexico courts would be repugnant to the Constitution, treaties or laws of the United States. However, the New Mexico Supreme Court in deciding this case did not rule on the question of the validity of any New Mexico statutes nor has Jojola raised any such issue in his jurisdictional statement. Until the New Mexico Supreme Court analyzes and rules on the relevant statutes and treaties as applied to the particular facts of an individual case or controversy, and rules that the federal statutes or treaties are invalid, or that New

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[6] Pursuant to Section 529, *et al.*, of the Child Support Enforcement Program Manual, any action to collect past Aid to Families with Dependent Children (AFDC) support must be approved by the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

Mexico statutes are valid which are allegedly repugnant to the Constitution, treaties or federal statutes, this Court has no justiciable case before it. *Flournoy v. Wiener*, 321 U.S. 253 (1944). *See Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210 (1889).

CONCLUSION

Wherefore, Appellee Department respectfully submits that the questions upon which this cause depends are moot, premature and so insubstantial as not to need further argument, and Appellee Department respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

PAUL G. BARDACKE
Attorney General of New Mexico

WILLIAM G. WALKER
Assistant Attorney General

P.O. Box 2348
Santa Fe, New Mexico 87504-2348
(505) 827–4122

Counsel for Appellee

July 12, 1983

CERTIFICATE OF SERVICE

I, William G. Walker, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that on the 12th day of July, 1983, I served the requisite number of copies of the foregoing Motion To Dismiss by first class mail on counsel of record for Appellant, Anthony F. Little, Indian Pueblo Legal Services, Inc., Star Route Box 38, Santa Ana Pueblo, Bernalillo, NM 87004.

WILLIAM G. WALKER
Assistant Attorney General

APPENDIX A

N.M. Human Services Dept. Program Manual, Income Support Division, Vol. III

529 Deference to Indian Tribal Sovereignty

The Human Services Department recognizes the right of Indian people residing on the reservation to resolve fundamental issues in the area of domestic relations within the framework of established principles of Indian Tribal sovereignty. As a result, and notwithstanding the holding of the New Mexico Supreme Court in State of New Mexico ex rel. Human Services Department v. Jojola, ____NM____, 660 P.2d 590 (1983), CSEB will not seek to establish the paternity in State Court of putative Indian fathers who are amenable to suit in Tribal Court where the mother, putative father, and child reside within the exterior boundaries of the reservation. In all such cases, a paternity petition shall be brought in the name of the natural mother, individually and as the natural guardian of the child, in the Tribal Court of competent jurisdiction. If the putative father is not amenable to suit in the Tribal Court or the Tribal Court will not exercise personal or subject matter jurisdiction, a paternity action may be brought in State court only upon the prior written approval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

No action to enforce an AFDC support obligation may be brought against an absent Indian parent who resides on the reservation without the prior written aprroval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department. No action to enforce a non-AFDC support obligation may be brought in State Court against an absent Indian parent who resides on the reservation without the prior written approval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

APPENDIX B

TRIBAL COURT OF ISLETA PUEBLO

DYANA ABEITA, Petitioner,

-vs-

JIMMY JOJOLA, Respondent.

PATERNITY PETITION

Comes now petitioner, Dyana Abeita, and states unto the Court:

1. This petition is filed pursuant to Section 1-1-20 of the Legal Code authorization suits to determine paternity and child support.

2. Petitioner and respondent are members and residents of this Pueblo.

3. On October 13, 1979, petitioner gave birth to a child, Jonathan Abeita, who is also a member and resident of this Pueblo.

4. Respondent is the natural father of Jonathan Abeita and should be required to contribute to the support of the minor child according to his means.

5. Respondent has refused to provide for the support of the minor child.

WHEREFORE, petitioner prays the Court for:

1. An order determining the respondent to be the natural father of petitioner's child, Jonathan Abeita.

2. An order requiring respondent to support the child according to his means.

3. Such other relief as to the Court seems reasonable.

s/ Carrell Ray

Attorney for Petitioner
909 Virginia NE, Suite 101
Albuquerque, New Mexico 87108
(505) 841-4582

PETITIONER VERIFICATION

STATE OF NEW MEXICO)
)
COUNTY OF BERNALILLO)

Diana Abeita, being duly sworn states that she is the petitioner in the matter herein and that she has read the foregoing petition and knows the contents thereof and that the same is true of her own knowledge except as to matters herein stated to be alleged on information and belief, and as to them she believes them to be true.

s/ Dyana Abeita
Petitioner

SUBSCRIBED and SWORN to before me this
15 day of June, 1983.

LeRoy J. Moore
Notary Public-New Mexico

My Commission Expires 5/2/85

APPENDIX C

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel.
HUMAN SERVICES DEPARTMENT,
Petitioner,

-vs- DR-81-1660

JIMMY ANDREW JOJOLA,
Respondent.

MOTION TO DISMISS

Comes now petitioner through Assistant Attorney General Carrell Ray and moves the Court for its order of dismissal without prejudice for the reason that the paternity issue will be pursued in the Tribal Court of Isleta Pueblo as requested by respondent.

Respectfully submitted,

s/ Carrell Ray

Assistant Attorney General
909 Virginia NE, Suite 101
Albuquerque, New Mexico 87108
(505) 841-4582

I certify that I mailed a copy of
the foregoing instrument to
opposing counsel of record this
13 day of June, 1983
CR

APPENDIX D

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel.
HUMAN SERVICES DEPARTMENT,
Petitioner,

-vs- DR-81-1660

JIMMY ANDREW JOJOLA,
Respondent.

ORDER

This matter having come before the Court on petitioner's motion to dismiss, petitioner appearing in person by and through Assistant Attorney General William Walker and Barbara A. Brown, respondent appearing by and through his attorney, Anthony F. Little and the Court being advised in the premises, IT IS THEREFORE BY THE COURT ORDERED that the above cause is dismissed pursuant to petitioner's motion, without prejudice.

s/ Judge A. Joseph Alarid

DISTRICT JUDGE

Approved by:

Assistant Attorney General

Assistant Attorney General

Anthony F. Little
Attorney for Respondent

APPENDIX E

New Mexico Statutes Annotated,
Public Assistance Act

27-2-27. Single State agency; powers and duties.

The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal act with the following duties and powers:

A. establish the paternity of a child in the case of the child born out of wedlock with respect to whom an assignment of support rights has been executed in favor of the department;

B. establish an order of support for children receiving aid to families with dependent children and, at the option of the department, for the spouse or former spouse with whom such children are living but only if a support obligation has been established with respect to such spouse or former spouse, for whom no order of support presently exists and seek modification, based upon the noncustodial parent's ability to pay, of existing orders in which the support order is inadequate to properly care for the child and the spouse or former spouse with whom the child is living;

C. enforce as the real party in interest any existing order for the support of children who are receiving aid to families with dependent children or of the spouse or former spouse with whom such children are living; and

D. represent nonaid families with dependent children in the establishment and enforcement of paternity and child support obligations, including locating the absent parent, for which it shall charge the applicant a start-up fee of twenty dollars ($20.00) and actual costs for the services performed,

which costs shall be recovered from support paid. If the costs exceed the amount of one month's support obligation, then the monthly collection shall be limited to ten percent of the collection. Where the service rendered is solely for the collection of past-due support, the department shall levy a fee not in excess of that provided by the federal act, against the delinquent parent[,] which fee shall be in addition to the amount of the delinquency and collectible as other judgments.

27-2-28. Liability for repayment of public assistance.

A. A noncustodial parent is liable to the department in the amount of the public assistance lawfully and properly furnished to the children, and the spouse or former spouse with whom such children are living, to whom the noncustodial parent owes a duty of support; except that if a support order has been entered, liability for the time period covered by the support order shall not exceed the amount of support provided for in the order, and provided that no claim not based upon a prior judgment can be made by the department for reimbursement for any period more than six years prior to the date of filing of any action seeking payment.

B. Amounts of support due and owing for periods prior to the granting of public assistance shall be paid to and retained by the department to the extent that the amount of assistance granted exceeds the amount of the monthly support obligation.

C. Amounts of support collected which are in excess of the amounts specified in Subsections A and B of this section will be paid by the department to the custodian of the child.

D. No agreement between any custodian of a child and a parent of that child, either relieving the parent of any duty of child or spousal support or responsibility or purporting to settle

past, present or future support obligations, either as a settlement or prepayment, shall act to reduce or terminate any rights of the department to recover from that parent for support provided, unless the department has consented to the agreement in writing.

E. The noncustodial parent shall be given credit for any support actually provided, including housing, clothing, food or funds paid prior to the entry of any order for support. The noncustodial parent has the burden on the issue of any payment.